Supreme Court, U.S.
FILED
DEC 5 1994
OFFICE OF THE CLERK

No. 93-1841

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

FEDERICO PENA, Secretary of Transportation, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE LATIN AMERICAN MANAGEMENT ASSOCIATION IN SUPPORT OF RESPONDENTS

PAMELA J. MAZZA
(Counsel of Record)
ANDREW P. HALLOWELL
ANTONIO R. FRANCO
FRANK C. GULIN
PILIERO, MAZZA & PARGAMENT
888 - 17th Street, N.W.
Suite 1100
Washington, D.C. 20006
(202) 857-1000

Attorneys for Amicus Curiae, The Latin American Management Association.

Washington, D.C. • THIEL PRESS • (202) 328-3288

BEST AVAILABLE COPY

Page

TABLE OF CONTENTS

INTEREST OF AMICUS CURIAE 1

SUMMARY OF ARGUMENT 2

ARGUMENT 3

I. *Fullilove* and *Metro Broadcasting* Apply To The Statutes Challenged In This Case 5

II. The Challenged Statutes Serve Important Governmental Objectives 7

III. The Small Business Act's Eligibility Criteria Are Narrowly Tailored To Alleviate The Effects of Past Discrimination 15

A. Social Disadvantage 16

B. Economic Disadvantage 21

C. Section 502 Is Not "Limitless" 26

CONCLUSION 27

TABLE OF AUTHORITIES

Cases:

Adarand Constructors, Inc. v. Pena, 16 F.3d 1537 (10th Cir. 1994) 26

Autek Systems Corp. v. United States, 835 F. Supp. 13 (D.D.C. 1993) 22

Blodgett v. Holden, 275 U.S. 142 (1927) 3

City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989) 5, 6

Cleland v. National College of Business, 435 U.S. 213 (1978) 6

Fullilove v. Klutznick, 448 U.S. 488 (1980) . . . . . *passim*

Metro Broadcasting, Inc. v. FCC, 497 U.S. 457 (1990) 6, 7, 10

Milwaukee County Pavers Ass'n v. Fiedler, 922 F.2d 419 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991) 24

Administrative Decisions: Page

Apex Roofing Co., Solicitation No. F29651-91-B-0025 (SBA Office of Program Eligibility, Sept. 27, 1991) 25

Computer Dynamics, Inc., Solicitation No. N00039-88-R-0221 (SBA MSB&COD, Nov. 16, 1989) 25

DeLeon Technical Services, Inc., Solicitation No. F05611-92-B-2010 (SBA Office of Program Eligibility, Jan. 13, 1993) 25

Hirsch & Co., Solicitation No. N68711-91-D-0007 (SBA Office of Program Eligibility, March 21, 1991) 25

Integrated Systems Analysts, Inc., GSBCA No. 10750-P, 91-1 BCA ¶23,477 (CCH) (1990) 25

Maralex Trucking, Inc., No. 386, Docket No. MSBE-91-6-25-14 (SBA Office of Hearings and Appeals, Dec. 5, 1991) 20

Super Solutions Corp., No. 461, Docket No. MSBE-93-12-28-19 (SBA Office of Hearings and Appeals, April 12, 1994). 24

Systems Management American Corp., Inc., Solicitation No. N00039-88-R-0221 (SBA Office of Program Eligibility, July 11, 1990) 25

Statutes:

Surface Transportation and Uniform Relocation Assistance Act of 1987, §106, Pub. L. No. 100-17, 101 Stat. 132 (1987) . . . . . *passim*

Small Business Act:

15 U.S.C. §631(f)(1)(A)-(G) 9

15 U.S.C. §636 note 14

15 U.S.C. §637(a). . . . . *passim*

15 U.S.C. §637(a)(5). 4, 16

15 U.S.C. §637(a)(6)(A) 5, 22

15 U.S.C. §637(a)(6)(C). 16

Statutes, continued: Page

15 U.S.C. §637(d). . . . . *passim*

15 U.S.C. §637(d)(3)(C) 4, 16

15 U.S.C. §644(g). 4, 26

15 U.S.C. §644(g)(1). 14

15 U.S.C. §644(h). 14

15 U.S.C. §644(h)(2). 26

15 U.S.C. §644(h)(3). 26

Public Works Employment Act of 1977, Pub. L. No. 95-28, 91 Stat. 116 42 U.S.C. §6701 *et seq.* 10

Small Business Investment Act of 1978, Pub. L. No. 95-507, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3835 *et seq.* . . . . . *passim*

Business Opportunity Development Reform Act of 1988, Pub. L. No. 100-656, 102 Stat. 3853 (1988). 13, 14

Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355,

§7102. 27

§7102(b)(2)(D) 27

National Defense Authorization Act for Fiscal Year 1987, §1207, 10 U.S.C. §2323 . . . . . 16, 24

Regulations:

13 C.F.R. §124.105(b) 20

13 C.F.R. §124.105(c). 17

13 C.F.R. §124.105(d) 19

13 C.F.R. §124.106(a). 22

Regulations, continued: Page

13 C.F.R. §124.106(a)(1). 22
13 C.F.R. §124.106(a)(1)(ii). 23
13 C.F.R. §124.106(a)(2)(ii). 24
13 C.F.R. §124.106(a)(5)(iii) 24
13 C.F.R. §124.106(b) 22
13 C.F.R. §124.603 19
13 C.F.R. §124.608 23
13 C.F.R. §124.609(h)(2) 23
49 C.F.R. §23.51 . . . . . 16, 22
49 C.F.R. §23.69 19
49 C.F.R. §23.69(a)(1) 22
49 C.F.R. §23.69(b) 22
49 C.F.R. Part 23, Subpt. D, App. C. 15-16

Legislative Materials:

H.R. Conf. Rep. No. 1714, 95th Cong., 2d. Sess. *reprinted in* 1978 U.S. Code Cong. & Admin. News 3879. . . . . 9, 12, 17, 19

S. Rep. No. 1070, 95th Cong., 2d Sess. *reprinted in* 1978 U.S. Code Cong. & Admin. News 3835. . . . . 9, 11

124 Cong. Rec. 29,641 (1978). 10

133 Cong. Rec. 33, 315 (1987) 13

134 Cong. Rec. 31,492 (1988). 14

H.R. Rep. No. 468, 94th Cong., 1st Sess. (1975) 12

H.R. Rep. No. 1791, 94th Cong., 2d Sess. (1977) 12

Subcontracting with Small and Disadvantaged Businesses: GSA Oversight: Hearings Before the Government Affairs and Transportation Subcommittee of the Committee on Government Operations, 100th Cong., 2d Sess. (1988). 12-13

No. 93-1841

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

ADARAND CONSTRUCTORS, INC.,

Petitioner,

v.

FEDERICO PENA, Secretary of Transportation, *et al.*,

Respondents.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE LATIN AMERICAN MANAGEMENT ASSOCIATION IN SUPPORT OF RESPONDENTS

INTEREST OF AMICUS CURIAE

The Latin American Management Association ("LAMA") is a non-profit organization located in Washington, D.C., the mission of which is to advance the interests of Hispanic-owned businesses and other small, minority-owned firms in the federal and commercial contracting arenas. Many of LAMA's members participate

in federal contracting programs designed to promote the development of firms owned by socially and economically disadvantaged individuals, including the Small Business Administration's section 8(a) program. The continued viability of many disadvantaged businesses rests on the technical, managerial and contractual assistance made available through these programs.

The letters of Petitioner and Respondents consenting to the filing of this brief amicus curiae have been filed with the Clerk of the Court pursuant to Rule 37.3, Rules of the Supreme Court of the United States. Amicus files this brief on the merits to support the position of the Respondents to this action.

SUMMARY OF ARGUMENT

Acts of Congress have been accorded great weight by this Court in recognition of the unique powers of the National Legislature. Because Petitioner challenges racial and ethnic classifications created by federal statutes, the less exacting standard of scrutiny described in *Fullilove v. Klutznick*, 448 U.S. 448 (1980), should be applied. The challenged statutes were passed by Congress in furtherance of important governmental objectives, which are to remedy past discrimination and foster the development of businesses owned by socially and economically disadvantaged individuals who have historically been the victims of discrimination.

The Small Business Act's eligibility criteria, as incorporated in the STURAA program, are narrowly tailored to provide business development opportunities to firms owned and controlled by socially and economically disadvantaged individuals. These criteria are not underinclusive in that they do not *ipso facto* exclude any individual or group from eligibility. Also, these criteria are

not overinclusive because they do not allow participation by socially disadvantaged persons who have experienced relative economic success.

ARGUMENT

Petitioner asks the Court to consider the constitutionality of an Act of Congress, "the gravest and most delicate duty that this Court is called on to perform." *Fullilove v. Klutznick*, 448 U.S. 448, 472 (1980) (quoting *Blodgett v. Holden*, 275 U.S. 142, 148 (1927)). After all, it is Congress that is "charged by the Constitution with the power to 'provide for the . . . general Welfare of the United States' and 'to enforce, by appropriate legislation,' the equal protection guarantees of the Fourteenth Amendment." *Fullilove*, 448 U.S. at 472.

Petitioner's challenge arises out of the Central Federal Lands Highway Division's Subcontracting Compensation Clause program, which is funded by section 106(a)(8) of the Surface Transportation and Uniform Relocation Assistance Act of 1987, Pub. L. No. 100-17, 101 Stat. 132, 145 (1987) (hereinafter "STURAA" or "STURAA program"). Section 106(c) of STURAA establishes, as a general rule, that not less than ten percent of the STURAA program's appropriated funds be expended with small businesses "owned and controlled by socially and economically disadvantaged individuals," which are referred to as "Disadvantaged Business Enterprises" ("DBEs").[1] This provision is authorized by section 502

[1] Although the STURAA program makes reference to "disadvantaged business enterprises," other similar programs make reference to "small and disadvantaged businesses." Both terms, however, refer to small businesses that are owned and controlled by individuals who are "socially and economically disadvantaged," as defined in the Small Business Act.

of the Small Business Act, 15 U.S.C. §644(g), which directs federal agencies to achieve at least five percent participation by small and disadvantaged businesses in federal contracting programs.

Section 106(c)(2)(B) of STURAA defines "socially and economically disadvantaged inviduals" by reference to the Small Business Act, 15 U.S.C. §637(d). It is the "presumption" contained in section 8(d) of the Small Business Act which is at the very core of this case:

> The contractor shall presume that socially and economically disadvantaged individuals include Black Americans, Hispanic Americans, Native Americans, Asian Pacific Americans and other minorities, or any other individual found to be disadvantaged by the [Small Business] Administration pursuant to section 8(a) of the Small Business Act.

15 U.S.C. §637(d)(3)(C).[2]

However, the term "socially disadvantaged individuals" does not exclude any individuals from qualifying:

> Socially disadvantaged individuals are those who have been subjected to racial or ethnic prejudice or cultural bias because of their identity as a member of a group without regard to their individual qualities.

15 U.S.C. §637(a)(5).

The term "economically disadvantaged individuals" is defined as follows:

> Economically disadvantaged individuals are those socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same business area who are not socially disadvantaged.

15 U.S.C. §637(a)(6)(A).

[2]Section 8(d) refers to "the contractor" because it was intended to impose requirements on prime contractors in their relationships with subcontractors owned by socially and economically disadvantaged individuals. *See* 15 U.S.C. §637(d).

Petitioner contends that the STURAA program's authorizing statute, section 502 of the Small Business Act, as well as the "presumption" incorporated into the STURAA program by reference, create unconstitutional racial and ethnic classifications. The precepts on which this position rest are flawed.

I.
FULLILOVE AND *METRO BROADCASTING* APPLY TO THE STATUTES CHALLENGED IN THIS CASE.

Petitioner seeks to heighten the judicial scrutiny of federal programs established by Congress in which racial or ethnic criteria are employed for remedial purposes. Implicit in this request is that this Court ignore *Fullilove*, which established the applicable standard of review under such circumstances, in favor of the standard in *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

The Small Business Act's small and disadvantaged business goal and the section 8(d) "presumption" were designed by Congress to eliminate the present effects of past discrimination and to foster the development of businesses owned by socially and economically disadvantaged individuals. In such an effort:

> Congress has necessary latitude to try new techniques such as the limited use of racial and ethnic criteria to accomplish remedial objectives; this is especially so in programs where voluntary cooperation with remedial measures is induced by placing conditions on federal expenditures. That the pro-

> gram may press the outer limits of congressional authority affords no basis for striking it down.

Fullilove, 448 U.S. at 490.

The "great weight" accorded to congressional action is in recognition that "in no organ of government, state or federal, does there repose a more comprehensive remedial power than in the Congress, expressly charged by the Constitution with competence and authority to enforce equal protection guarantees." *Id.* at 484. Accordingly, the level of scrutiny articulated in *Fullilove* is appropriate.

Federal programs designed to remedy discrimination are properly subject to a lesser degree of scrutiny because Congress has broad remedial powers under the Commerce Clause, Spending Clause and Civil War Amendments. *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 563 (1990) (citing *Fullilove*, 448 U.S. at 473-78 (opinion of Burger, C.J.)); *see also Fullilove*, at 499-500, 508-09 (Powell, J., concurring). This is in contrast to state and local programs which must undergo more rigorous scrutiny under *Croson*. The reason for this dichotomy is that "the struggle for racial justice has historically been a struggle by the national society against oppression in the individual States." *Croson*, 488 U.S. at 522 (Scalia, J., concurring). Congress, as the National Legislature with the institutional competence and authority to enforce equal protection guarantees, should therefore be subject to a less exacting standard of review than state and local governments. *Fullilove*, 448 U.S. at 490 (opinion of Burger, C.J.); *id.* at 498 (Powell, J., concurring); *see also Cleland v. National College of Business*, 435 U.S. 213, 221 (1978) ("the District Court's error was . . . its failure to give appropriate deference to Congress' judgment . . . .").

Although the challenged statutory provisions were designed to correct past inequities, as discussed below, they were also intended to foster the development of small and disadvantaged businesses. Therefore, to the extent that the provisions in question are benign measures, they serve an important governmental objective and withstand constitutional scrutiny. As the Court stated in *Metro Broadcasting:*

> [B]enign race-conscious measures mandated by Congress – even if those measures are not 'remedial' in the sense of being designed to compensate victims of past governmental or societal discrimination – are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to achievement of those objectives.

497 U.S. at 564.

In sum, the Court of Appeals for the Tenth Circuit properly applied the standards articulated in *Fullilove* and *Metro Broadcasting*. Accordingly, the statutes challenged in this case are subject to a leas exacting level of scrutiny, and the important governmental objectives – to provide members of historically victimized groups with the ability to develop and expand their businesses so that they are able to compete in the mainstream economy – withstand constitutional scrutiny.

II.
THE CHALLENGED STATUTES SERVE IMPORTANT GOVERNMENTAL OBJECTIVES.

The Small Business Act's small and disadvantaged business goal and the section 8(d) "presumption" serve important governmental objectives that have been clearly articulated by Congress. As such, these statutes do not

violate the equal protection component of the Due Process Clause of the Fifth Amendment.

In 1978, Congress passed the Small Business Investment Act of 1978, Pub. L. No. 95-507 ("1978 Act"), which, among other things, established the section 8(d) subcontracting program and codified existing regulations regarding the section 8(a) program, 15 U.S.C. §637(a).[3] As discussed above, the purposes of these programs are twofold. First, Congress sought to remedy past discrimination against minority-owned firms and other socially and economically disadvantaged individuals. Second, the programs were intended to offer socially and economically disadvantaged individuals the opportunity to participate fully in the free enterprise system through contracting opportunities with the federal government. Congress determined that by assisting these individuals in obtaining social and economic equality the Nation as a whole would also benefit through an improved functioning economy and more

[3]Although the eligibility requirements for the §8(a) program mirror the requirements for the STURAA program, the 8(a) program operates under a different format. To gain entry into the §8(a) program, an individual must submit a detailed application to the Small Business Administration ("SBA") which is supported by evidence that the individual is "socially and economically disadvantaged." If the SBA determines that the concern is eligible to participate in the program, it is admitted for a fixed program period. After the expiration of that period, the concern "graduates" from the program. With respect to contractual assistance under the program, federal procuring agencies are authorized to set-aside procurement opportunities for 8(a) program participants. Depending on the value of the prospective contract, award is made either on a sole-source basis, or through competition among eligible 8(a) firms. The ensuing 8(a) contract is "tripartite" in nature, with the SBA serving as the prime contractor, and the 8(a) firm serving as the SBA's subcontractor.

competition in the free enterprise system. *See* 15 U.S.C. §631(f)(1)(A)-(G).

The legislative history of the 1978 Act reveals that, in addition to fostering the development of disadvantaged businesses, Congress specifically sought to redress "past and present discrimination." H.R. Conf. Rep. No. 1714, 95th Cong., 2d. Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3879, 3881-82. Congress recognized that "historic past discrimination" had hindered the efforts of many groups to "participate in the free enterprise system." S. Rep. No. 1070, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3835, 3850. Indeed, Congress found that, in many cases, business owners were tarred by their identification as members of minority groups:

> [M]any persons are socially disadvantaged because of their identification as a member of certain groups including, but not limited to, Black Americans, Hispanic Americans, Native Americans and other minorities that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control.

H.R. Conf. Rep. No. 1714, 95th Cong., 2d. Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3879, 3881-82.[4]

As co-sponsor of the Senate bill, Senator John Glenn made clear that the purpose of the 1978 Act was not only to correct the inequalities created by past discrimin-

[4]As discussed *infra*, in 1978, Congress made clear that the effects of discrimination extended beyond racial and ethnic lines and included "other Americans" who may have been subject to cultural bias. H.R. Conf. Rep. No. 1714, 95th Cong., 2d. Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3879, 3881-82.

ation, but also to promote increasing levels of participation by disadvantaged businesses so that they could compete in the economic mainstream:

> [T]here is still a long way to go to move minorities into the Nation's economic mainstream. Minorities only own 4 percent of the Nation's businesses and account for less than 1 percent of total business receipts. The administration has pledged to triple Federal procurements to minorities by 1979 and I strongly support that objective. I hope that we will see committed and aggressive action by the Federal agencies whose responsibility it is to carry out that pledge.

124 Cong. Rec. 29,641 (1978).

Importantly, Congress passed the 1978 Act approximately one year after it passed the Public Works Employment Act of 1977 ("PWEA"), Pub. L. No. 95-28, 91 Stat. 116, codified at 42 U.S.C. §6701 *et seq*. As noted in *Fullilove*, the Court may look beyond the legislative history and examine the total contemporary record of congressional action dealing with the problems of discrimination against socially and economically disadvantaged business enterprises. *Fullilove*, 448 U.S. at 503 (Powell, J., concurring).[5] When Congress enacted the PWEA, there was "abundant evidence from which it could conclude that minority businesses had been denied effective participation in public contracting opportunities by procurement practices that perpetuated the effects of prior discrimination." *Id.* at 477-78. In particular, the

[5]Similarly, in *Metro Broadcasting*, the Court noted that, where "Congress has legislated repeatedly in an area of national concern, its Members gain experience that may reduce the need for fresh hearings or prolonged debate when Congress again considers action in that area." 497 U.S. at 572 (quoting *Fullilove*, 448 U.S. at 502-03 (Powell, J., concurring)).

Fullilove Court noted that the following evidence was available to Congress:

> Congress had before it, among other data, evidence of a long history of marked disparity in the percentage of public contracts awarded to minority business enterprises. This disparity was considered to result not from any lack of capable and qualified minority businesses, but from the existence and maintenance of barriers to competitive access which had their roots in racial and ethnic discrimination, and which continue today, even absent any intentional discrimination or any other unlawful conduct.

Id. at 478.

When Congress passed the 1978 Act the following year, Congress had available to it the same evidence of "historic past discrimination" in public contracting. S. Rep. No. 1070, 95th Cong., 2d Sess. 15, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3835, 3850. It would have been entirely duplicative for Congress to convene hearings to compile the same evidence of "historic past discrimination" in public contracting.

Thus, Congress passed the 1978 Act and established the 8(d) "presumption" in recognition of its finding that certain racial and ethnic groups had historically suffered from the effects of discrimination. The objectives of the statute were supported by substantial evidence of past discrimination in public contracting. At that time, Congress had "abundant historical basis from which it could conclude that traditional procurement practices, when applied to minority businesses, could perpetuate the effects of prior discrimination," *Fullilove*, 448 U.S. at 478, and that "many persons are socially disadvantaged because of their identification as a member of cer-

tain groups . . . that have suffered the effects of discriminatory practices or similar invidious circumstances over which they have no control."[6] H.R. Conf. Rep. No. 1714, 95th Cong., 2d. Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3879, 3881-82. Congress acted well within its power when it authorized the section 8(d) "presumption."

Unfortunately, over the course of the following decade, many of the legitimate objectives sought to be achieved by the 1978 Act were not reached.[7] Small and

[6] For example, before Congress passed the PWEA, the House Committee on Small Business issued a Report, H.R. Rep. No. 1791 (1977), which discussed a 1975 Committee Report – "Minority Enterprises and Allied Problems of Small Business" – regarding the effects of past discrimination on the participation of socially and economically disadvantaged individuals in the Nation's economy. *See* H.R. Rep. No. 1791, at 124-49, referring to H.R. Rep. No. 468 (1975). In addition to this Report, Congress had available to it a Report by the U.S. Commission on Civil Rights, "Minorities and Women as Government Contractors," regarding the barriers encountered by minority businesses in gaining access to government contracting opportunities at the federal, state and local levels. *See Fullilove*, 448 U.S. at 466-67. Congress also had available to it a Report by the U.S. General Accounting Office – "Questionable Effectiveness of the §8(a) Procurement Program," GAO/GGD-75-57 (1975). *See Fullilove*, 448 U.S. at 467.

[7] To illustrate, on July 6, 1988, hearings were held before the Government Activities and Transportation Subcommittee of the House Committee on Government Operations to review the General Services Administration's ("GSA") implementation of Public Law 95-507. Specifically, the Subcommittee reviewed compliance with the requirement that, generally, federal contracts in excess of $500,000 ($1 million for construction contracts) include a subcontracting plan with specific contracting goals for small and disadvantaged businesses. Based on information provided by the GSA, the Subcommittee determined that 589 contracts were awarded by the GSA in 1987 to prime contractors for a total of $3.4 billion. However, of that total, minority-owned small businesses received a paltry .006 percent in subcontracts. *Subcon-*

[footnote continued]

disadvantaged business participation did not rise to the levels deemed necessary by Congress to correct past inequalities. Because these businesses were not provided with the necessary assistance to allow them to compete meaningfully in the free market economy, the effects of past discrimination lingered and the need to revamp the Small Business Act was dire. Accordingly, in response to perceived failures of the 1978 Act, Congress passed the Business Development Reform Act of 1988, Pub. L. No. 100-656, 102 Stat. 3853 (1988) ("1988 Act").

The objective of the 1988 Act was to strengthen the 1978 Act by changing the 8(a) program, and encouraging all federal agencies to strive toward increasing small and disadvantaged business participation. As the Chairman of the House Committee on Small Business, John LaFalce, stated during floor debates, the 8(a) program is "intended to be the most significant effort of the Federal Government to reduce the effects of discrimination on entrepreneurial endeavors." 133 Cong. Rec. 33,315 (1987) (statement of Congressman LaFalce).

The Senate Small Business Committee's ranking Republican, Senator Lowell Weicker, echoed the concern that the effects of discrimination persisted in federal contracting. Senator Weicker also reiterated the importance of continuing these programs for the purpose of achieving fair and proportionate small and disadvantaged business representation:

> But I will again say, and the few who might have doubts about the need to continue to provide such business opportunities as this program offers, there

tracting with Small and Disadvantaged Businesses: GSA Oversight: Hearing before the Government Activities and Transportation Subcommittee of the House Committee on Government Operations, 100th Cong., 2d Sess. 2, 22 (1988).

> is still much to be done if we are ever to meet the challenge of opening doors to the minority business community to enter and rightfully participate in this Nation's rich economy. There are more than 17 million small businesses in this country, yet less than 1 million are owned and controlled by minorities and more than 90 percent of those are still single owner, mom and pop operations.

134 Cong. Rec. 31,492 (1988).

To overcome these shortcomings, Congress included a provision in the 1988 Act which established a goal to award small and disadvantaged businesses at least five percent of the total value of all prime contracts and subcontracts during each fiscal year. Pub. L. No. 100-656, §502, 102 Stat. 3887, codified at 15 U.S.C. §644(g)(1). To monitor compliance with the goal, Congress established reporting requirements. Pub. L. No. 100-656 at §§503 and 504, codified at 15 U.S.C. §644(h) and §636 note, respectively. A Commission on Minority Business Development was also established to study the efficacy of all federal programs intended to promote minority business development. *Id.* at §505, codified at 15 U.S.C. §636 note.

In short, the 1988 Act was passed in response to a recognition by Congress that the 1978 Act had failed to eliminate the effects of discrimination in federal contracting. There was little need to engage in additional fact-finding since the efforts undertaken in 1978 had been largely unsuccessful and small and disadvantaged businesses continued to struggle in their efforts to overcome the effects of past discrimination. Because Congress realized that it could not achieve its objectives without the wholehearted assistance of all federal agencies, a government-wide goal was established. Drawing

from the total contemporary record of congressional action dealing with the effects of discrimination in federal contracting, this Court should find that the statutory provisions challenged by the Petitioner are substantially related to important and well-considered governmental objectives – i.e., remedying past discrimination and promoting the development of businesses owned by socially and economically disadvantaged individuals.

III.
THE SMALL BUSINESS ACT'S ELIGIBILITY CRITERIA ARE NARROWLY TAILORED TO ALLEVIATE THE EFFECTS OF PAST DISCRIMINATION.

The Small Business Act's eligibility criteria, as incorporated by reference into the STURAA program, are narrowly tailored to ensure that only those persons intended by Congress to benefit from small and disadvantaged business programs are permitted to participate. In particular, these eligibility criteria do not exclude any person from consideration as a "socially" or "economically" disadvantaged individual. Rather, any individual who can demonstrate that he or she has been victimized by racial, ethnic or cultural bias will satisfy these eligibility standards. Additionally, individuals who have attained a relative degree of economic success are ineligible to participate even though they may be "socially" disadvantaged. Because the Small Business Act's eligibility criteria are neither overinclusive nor underinclusive, they withstand constitutional scrutiny.

As noted above, the STURAA program grants eligibility to businesses which are owned and controlled by "socially and economically disadvantaged individuals."[8]

---

[8] Under the STURAA program, subcontractors must annually certify their "socially and economically disadvantaged" status. 49

[footnote continued]

For the definition of this term, the STURAA program adopts the same standard as that which is contained in the Small Business Act, 15 U.S.C. §637(a) and (d). *See* Pub. L. No. 100-17, §106(c), 101 Stat. 146 (1987). The Small Business Act describes eligibility criteria for the section 8(a) and 8(d) programs, we well as other federal programs created pursuant to congressional mandate to eliminate the effects of discrimination in federal contracting.[9] As noted above, section 8(d) presumes that certain racial and ethnic groups, including Black Americans, Hispanic Americans, and Native Americans, are both socially and economically disadvantaged. 15 U.S.C. §637(d)(3)(C).[10]

A. Social Disadvantage

The Small Business Act defines "socially disadvantaged" individuals as those "who have been subjected to racial or ethnic prejudice or cultural bias . . . without regard to their individual qualities." 15 U.S.C. §637-(a)(5). Importantly, this definition does not grant a "preference," as Petitioner maintains, to members of any particular racial or ethnic group. Rather, as discussed below, *any* person who can make the requisite showing that he or she has been subjected to bias may qualify as "socially disadvantaged." Moreover, *any* group

C.F.R. §23.51 and Subpt. D, App. C. As discussed *infra*, this certification is subject to challenge.

[9] For example, §1207 of the National Defense Authorization Act for Fiscal Year 1987, 10 U.S.C. §2323, established a small and disadvantaged business program specific to the Department of Defense, which incorporates the Small Business Act's definition of "socially and economically disadvantaged individuals."

[10] In contrast, applicants to the §8(a) program are not presumed to be "economically" disadvantaged. *See* 15 U.S.C. §637(a)(6)(C).

may gain entitlement to the "presumption" described in section 8(d).

The flexibility within these eligibility criteria is consistent with congressional intent. Indeed, Congress sought to keep the doors to small and disadvantaged business programs open even to white individuals, provided they could make the requisite showing:

> [B]ecause of present and past discrimination many minorities have suffered social disadvantagement . . . . However, the Conferees realize that other Americans may also suffer from social disadvantagement because of cultural bias. For example, a *poor Appalachian white person* who has never had the opportunity for a quality education or the ability to expand his or her cultural horizons, *may similarly be found socially disadvantaged* . . . .

H.R. Conf. Rep. No. 1714, 95th Cong., 2d Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3879, 3882. (Emphasis added).

Additionally, regulations implementing the section 8(d) program make clear that any individual may qualify as "socially disadvantaged" if he or she can prove social disadvantage by clear and convincing evidence. 13 C.F.R. §124.105(c).[11]

Moreover, although Congress listed certain groups that are "presumed" to be socially disadvantaged, the list is non-exclusive. Any "identifiable group," as a whole, may gain entitlement to the same "presumption." The SBA has established detailed procedures for such group recognition:

[11] In the case at bar, Petitioner was not *ipso facto* excluded from consideration as a "socially disadvantaged" firm.

Socially disadvantaged group inclusion –

(1) General. Upon an adequate preliminary showing to SBA by representatives of an identifiable group that the group has suffered *chronic racial or ethnic prejudice or cultural bias,* and upon the request of the representatives of the group that SBA do so, SBA shall publish in the FEDERAL REGISTER a notice of its receipt of a request that it consider a group not specifically named in paragraph (b)(1) of this section to have members which are socially disadvantaged because of their identification as members of the group for the purpose of eligibility for the 8(a) program. The notice shall adequately identify the group making the request, and if a hearing is requested on the matter and such request is granted, the time, date and location at which such hearing is to be held. All information submitted to support a request should be addressed to the AA/MSB&COD.

(2) Standards to be applied. In determining whether a group has made an adequate preliminary showing that it has suffered chronic racial or ethnic prejudice or cultural bias for the purposes of this regulation, SBA shall determine:

(i) Whether the group has suffered the effects of prejudice, bias, or discriminatory practices;

(ii) Whether such conditions have resulted in economic deprivation for the group of the type which Congress has found exists for the groups named in the Small Business Act; and

(iii) Whether such conditions have produced impediments in the business world for members of the group over which they have no control and which are not common to all small business owners. If it is demonstrated to SBA by a particular group that it satisfies the above criteria, SBA will

publish the notice described in paragraph (d)(1) of this section.

13 C.F.R. §124.105(d). (Emphasis added).

Thus, consistent with congressional intent, the "presumption" can be applied to any group of individuals that has been victimized. The aforementioned procedures comply with fundamental due process requirements in that they provide for public notice and an opportunity to present evidence at a hearing. Therefore, the "presumption" is not an arbitrary or underinclusive standard, as has been suggested. Rather, it is available to *any* group that can make the requisite showing of bias.

Furthermore, the presumption that any individual member of a designated group is "socially disadvantaged" is rebuttable. Under the STURAA program (as well as other small and disadvantaged business programs), a subcontractor's certification that it is owned and controlled by a "socially disadvantaged" individual may be protested by interested parties. *See* 49 C.F.R. §23.69; 13 C.F.R. §124.603. Therefore, rather than mandating that members of designated groups be considered "socially disadvantaged," the "presumption" shifts the burden of proof to those who choose to challenge an individual's claim of socially disadvantaged status.

Indeed, Congress has stated that membership in a designated group does not guarantee one's eligibility as "socially disadvantaged:"

> *[I]n many, but not all, cases* status as a minority can be directly and unequivocally correlated with social disadvantagement . . . .

H.R. Conf. Rep. No. 1714, 95th Cong., 2d Sess. 21-22, *reprinted in* 1978 U.S. Code Cong. & Admin. News 3879, 3882. (Emphasis added). Also, SBA regulations

provide that "*in the absence of evidence to the contrary,* the following individuals are presumed to be socially disadvantaged: Black Americans; Hispanic Americans...." 13 C.F.R. §124.105(b). (Emphasis added). Thus, an individual's membership in a designated group does not *ipso facto* lead to a finding of social disadvantage.

For example, in *Maralex Trucking, Inc.*, No. 386, Docket Nol MSBE-91-6-25-14 (SBA Office of Hearings and Appeals, Dec. 5, 1991), a Black-American applicant for the SBA's section 8(a) program certified in her application that, although she had suffered limited employment opportunities as a result of sexual discrimination, she had not suffered unemployment or limited educational opportunities as a result of racial discrimination. The SBA refused to admit the applicant into the 8(a) program. In remanding the matter following appeal, the SBA's Office of Hearings and Appeals ("OHA") noted that the applicant's statement that she had not suffered social disadvantage as a result of racial discrimination:

> [T]aken alone, might be considered to be 'evidence to the contrary,' as that term is used in §124.105(b) of the regulations, and thus a sufficient reason to deny her social disadvantage on the basis of her being a Black-American.

Decision at p. 14 n.7.

In sum, any individual may qualify as "socially disadvantaged" provided the requisite showing is made. In addition, although members of certain groups are "presumed" to be "socially disadvantaged," any "identifiable group" may gain entitlement to the "presumption" if its claim is supported by sufficient evidence of past discrimination. Finally, the "presumption" that an individual member of a designated group is "socially

disadvantaged" is rebuttable and may be disproved by interested parties.

B. Economic Disadvantage

Under the Small Business Act's eligibility criteria, social disadvantage alone will not suffice. An individual must also show that he or she has suffered "economic disadvantage." The "economic disadvantage" requirement is a legitimate color-blind criterion which limits eligible participants in small and disadvantaged business programs, including the STURAA program, to those who have felt the economic effects of discrimination. This economic criterion further demonstrates that the Small Business Act's eligibility requirements are not overinclusive, but rather, narrowly tailored to achieve legitimate objectives.

SBA regulations define "economic disadvantage" as follows:

> [E]conomically disadvantaged individuals are socially disadvantaged individuals whose ability to compete in the free enterprise system has been impaired due to diminished capital and credit opportunities as compared to others in the same or similar line of business who are not socially disadvantaged, and such diminished opportunities have precluded or are likely to preclude such individuals from successfully competing in the open market. In determining economic disadvantage for purposes of 8(a) program eligibility, SBA shall compare the applicant concern's business and financial profile with profiles of businesses in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals.
>
> (ii) This program is not intended to assist concerns owned and controlled by socially disadvantaged individuals who have accumulated substantial

> wealth, who have unlimited growth potential or who have not experienced or have overcome impediments to obtaining access to financing, markets and resources.

13 C.F.R. §124.106(a)(1). *See also* 15 U.S.C. §637(a)-(6)(A).[12]

No individual, regardless of his or her race or ethnicity, is eligible for the STURAA program (or other small and disadvantaged business programs) if that individual has advanced in the business world and overcome the impediments caused by his or her status as a socially disadvantaged individual. Thus, the assertion by *amicus curiae* Atlantic Legal Foundation that members of the designated groups are presumed to be economically disadvantaged even if they are "wealthy" (*see* Brief at 16) is inaccurate. *See Autek Systems Corp. v. United States,* 835 F. Supp. 13, 15 (D.D.C. 1993) (upholding SBA's rejection of 8(a) applicant due to owner's high income).

Although subcontractors in the STURAA program need only certify as to their DBE status, this certification may be protested by interested parties, including competing subcontractors. 49 C.F.R. §§23.51 and 23.69(a)(1). In that event, an investigation is undertaken to determine if the subcontractor is, in fact, "economically disadvantaged." 49 C.F.R. §23.69(b).

The protest procedures in the STURAA program are similar to the protest procedures created pursuant to the Small Business Act. In considering a protest which

[12] In determining "economic disadvantage" for purposes of the §8(d) subcontracting program and the Department of Defense's Small and Disadvantaged Business ("SDB") program, the SBA applies the same criteria used in determining disadvantaged status under the §8(a) program. 13 C.F.R. §124.106(a). However, in reviewing eligibility under the §8(d) and SDB programs, the SBA applies those criteria in a less restrictive manner. 13 C.F.R. §124.-106(b).

alleges that a firm is not owned and controlled by an "economically disadvantaged" individual, the SBA considers factors relating both to the financial condition of the individual claiming disadvantaged status *and* the financial condition of the business. In so doing, the SBA examines three areas:

> (1) the personal financial condition of the individual claiming disadvantaged status, including that individual's access to credit and capital;
>
> (2) the financial condition of the business; and
>
> (3) the business' access to credit, capital and markets.[13]

A finding of non-disadvantaged status not only renders the firm ineligible for award in the procurement at issue, but such a finding also renders the firm ineligible to compete in the future, absent a change in its financial condition. 13 C.F.R. §124.609(h)(2).

Regarding the first factor, a review of the owner's individual financial condition is conducted in order to exclude socially disadvantaged individuals who have "accumulated substantial wealth, who have unlimited growth potential or who have not experienced or have overcome impediments to obtaining access to financing, markets and resources." 13 C.F.R. §124.106(a)(1)(ii). The SBA considers all forms of personal income, including the individual's gross salaries, wages, remuneration, fees, allowances, dividends, commissions and receipts

[13] Specifically, the SBA examines: (1) business tax returns for the last two completed fiscal years; (2) personal tax returns for the last two years for all officers, directors and individuals owning at least five percent of the entity; (3) business financial statements for the last two completed fiscal years; (4) Articles of Incorporation and Bylaws; and (5) such other information as may be required. 13 C.F.R. §124.608.

of all kinds and descriptions. *See Super Solutions Corp.*, No. 461, Docket No. MSBE-93-12-28-19, at p. 2 (SBA Office of Hearings and Appeals, April 12, 1994).

With regard to the second factor, the SBA must "compare the applicant concern's business and financial profile with profiles of businesses in the same or similar line of business which are not owned and controlled by socially and economically disadvantaged individuals." 13 C.F.R. §124.106(a)(2)(ii). The SBA reviews the assets, revenues, pre-tax profit, working capital and net worth of the business, including the value of the investments in the business held by the individual claiming disadvantaged status. *Id.*

Finally, in considering the concern's access to credit and capital, the SBA evaluates its access to long-term and working capital financing, equipment trade credit, raw materials and supplier trade credit, and bonding capability. 13 C.F.R. §124.106(a)(5)(iii).

Despite the view of the Court of Appeals for the Seventh Circuit in *Milwaukee County Pavers Ass'n v. Fiedler*, 922 F.2d 419, 422 (7th Cir.), *cert. denied*, 500 U.S. 954 (1991), that the rebuttable presumption of disadvantaged status is "likely to be decisive," the protest procedures described above have been employed frequently and with great effect.[14]

For example, in a single federal procurement offered by the Department of the Navy, four of nine offerors in

[14]The majority of reported protests arise out of the Department of Defense's SDB program, §1207 of the National Defense Authorization Act for Fiscal Year 1987, 10 U.S.C. §2323. Like the STURAA program, this program relies on the Small Business Act's eligibility requirements.

the competitive range were found by the SBA to be non-disadvantaged, and therefore, ineligible for award. *See Integrated Systems Analysts, Inc.*, GSBCA No. 10750-P, 91-1 BCA ¶23,477 (CCH) (1990). Indeed, in *Integrated Systems Analysts*, the General Services Administration Board of Contract Appeals, in summarizing the results of protests filed during the prior three years, noted that the SBA had found "a hundred or more" firms to be ineligible and "in excess of forty" to be eligible for participation in the Department of Defense's SDB program. 91-1 BCA at p. 117,776.

In *Computer Dynamics, Inc.*, Solicitation No. N00039-88-R-0221 (SBA MSB&COD, Nov. 16, 1989), the SBA found that the protested business was not "economically disadvantaged" despite the fact that its owner was "socially disadvantaged." In declaring the company ineligible, the SBA found the owner's personal financial condition, the company's business financial condition, and the company's access to credit and capital to be above national averages. The SBA concluded that the company's owner had "accumulated substantial wealth and [had] overcome the impediments to obtaining access to financing, markets and resources." Decision at p. 4. *See also Systems Management American Corp., Inc.*, Solicitation No. N00039-88-R-0221 (SBA Office of Program Eligibility, July 11, 1990) (denying eligibility to business owned by "socially disadvantaged" individual); *DeLeon Technical Services, Inc.*, Solicitation No. F05611-92-B-2010 (SBA Office of Program Eligibility, Jan. 13, 1993) (finding "socially disadvantaged" owner's wealth was "not indicative of an individual who is economically disadvantaged"). *Cf. Apex Roofing Co.*, Solicitation No. F29651-91-B-0025 (SBA Office of Program Eligibility, Sept. 27, 1991) and *Hirsch & Co.*, Solicita-

tion No. N68711-91-D-0007 (SBA Office of Program Eligibility, March 21, 1991) (denying eligibility to "socially disadvantaged" owners unable to certify that their ability to compete in the free enterprise system had been impaired).

In short, claims of "economic disadvantage" frequently are challenged and often disproved. Unquestionably, the SBA closely monitors eligibility in accordance with definitive requirements. Accordingly, the Small Business Act's eligibility criteria are narrowly tailored and strictly enforced to achieve the legitimate objectives of redressing the effects of past discrimination and fostering the development of small and disadvantaged businesses.

C. Section 502 is Not "Limitless"

Contrary to Petitioner's assertions, section 502 of the Small Business Act, 15 U.S.C. §644(g), is not "potentially limitless" in extent and duration. Rather, the Court of Appeals for the Tenth Circuit correctly noted that federal procurement and contracting practices are subject to "regular 'reassessment and reevaluation by Congress.' " *Adarand Constructors, Inc. v. Pena,* 16 F.3d 1537, 1546 (10th Cir. 1994) (citations omitted). Indeed, the Small Business Act requires the SBA submit to the President a detailed annual report analyzing the extent of federal contracting with small and disadvantaged businesses. 15 U.S.C. §644(h)(2). The President, in turn, is required to include such information in an annual report to Congress. *Id.* at §644(h)(3).

Through the reauthorization and appropriation processes, Congress exercises periodic oversight of the section 502 small and disadvantaged business goal. In addition, outside of these processes, Congress may enact

legislation which impacts on the goal. For example, as part of the Federal Acquisition Streamlining Act of 1994, Pub. L. No. 103-355, §7102, Congress recently created an additional tool to assist federal agencies in meeting their individual small and disadvantaged business goals established pursuant to section 502.[15] The passage of this legislation demonstrates ongoing congressional oversight and commitment to eliminating the effects of discrimination in federal contracting. Accordingly, section 502 is not "limitless," but rather, is subject to periodic review and evaluation by Congress.

CONCLUSION

For the reasons set forth above, Amicus Curiae respectfully urges this Court to affirm the decision of the United States Court of Appeals for the Tenth Circuit.

Dated: December 5, 1994

Respectfully submitted,

PAMELA J. MAZZA
(Attorney of Record)
ANDREW P. HALLOWELL
ANTONIO R. FRANCO
FRANK C. GULIN

---

[15] Significantly, the Federal Acquisition Streamlining Act of 1994 mandates that regulations be developed to place limitations on small and disadvantaged business contracting in any industry category that is bearing a disproportionate share of small and disadvantaged business contracts. *See* Pub. L. No. 103-355, §7102(b)-(2)(D). Thus, Congress is continuing to carefully scrutinize the impact of small and disadvantaged business programs on non-disadvantaged firms.